(1) Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

CHARLES M. McCARTHY. JR.,

Petitioner,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Respondent.

On Petition For Writ of Certiorari

To The United States Court of Appeals

For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether the Commissioner of Social Security, as a threshold issue of subject matter jurisdiction in cases alleging past overpayments of Title II benefits to persons who are no longer receiving or applying for any type of social security benefit, is required to produce documentation showing that past Title II benefit payments were actually made to that person during the period in question, as a prerequisite to establishing *ab initio* subject matter jurisdiction by the Commissioner over that person under the overpayment provisions of 42 U.S.C. § 404(a) and the Social Security Act?

2. Whether the district court below, as a court of limited jurisdiction, has no statutory authority to remand the case below under 42 U.S.C. § 405(g), because the case before the district court is before the disrict court under 28 U.S.C. § 1331 and does not include a a "final decision" under § 405(g)(1) as Petitioner is not presently and was not at the time of the administrative decision in respect thereof a "Claimant" filing

an application for benefits under 20 C.F.R. § 404.602 and (2) as the Court of Appeals found in its decision that "the record in this case is devoid of any documents showing that payments were actually made to [Petitioner] McCarthy" ?

3. Whether the district court below, as a court of limited jurisdiction, is presumed to lack jurisdiction in the case below, and whether the "substantial evidence" standard contained in § 405(g) of the Social Security Act may be utilized as an evidentiary standard to determine the application of the Social Security Act itself to the case below, prior to establishment by the Commissioner by a "preponderance of the evidence" of subject matter jurisdiction over Petitioner under the overpayment provisions of 42 U.S.C. § 404(a) and the Social Security Act?

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Official Reports

The Court of Appeals decision that is the subject of this Petition was published as McCarthy v. Apfel, 221 F.3d 1119 (9th Cir. 2000). The district court decision under review by the Court of Appeals is an unpublished decision of the United States District Court, Northern District of California. The administrative decision of the Commissioner of Social Security under review by the Court of Appeals decision is also an unpublished decision.

Jurisdiction

The Court of Appeals decision that is the subject of this Petition was filed on August 15, 2000. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc with the United States Court of Appeals For The Ninth Circuit, which Petition was denied on October 26, 2000. See Appendix, at Page A-22 to Page A-23 hereof.

This Court has jurisdiction to review the Court of Appeals decision under the provisions of 28 U.S.C. § 1254(1).

Statutory Provisions and Regulations

28 U.S.C. § 1331. Federal Question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 404(a)

Whenever the Commissioner of Social Security finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Commissioner of Social Security . . .

42 U.S.C. § 405(g)

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after mailing to him of

notice of such decision or within such further time as the Commissioner of Social SEcurity may allow.

20 C.F.R. § 404.501(a)

. . . As used in this subpart, the term *overpayment* includes a payment in excess of the amount due under Title II of the Act . . .

20 C.F.R. § 404.602

Claimant means the person who files an application for benefits for himself or herself of the person for whom an application is files.

20 C.F.R. 404.702

Evidence means any record, document, or signed statement that helps you show whether you are eligible for benefits or whether you are still entitled to benefits.

20 C.F.R. 404.950(c)

(c) **What evidence is admissible at a hearing.** The administrative law judge may receive evidence at the

hearing even though the evidence would not be admissible in court under the rules of evidence used by a court.

Statement of the Case

A. In the case below in which the Commissioner of Social Security alleges Title II benefit overpayments to Petitioner during the period March 1988 to March 1990, the Commissioner produced no documents for the record below that showed that any benefit payments were made to Petitioner by the Social Security Administration.

The Commissioner of Social Security (the "Commissioner") has alleged that Petitioner was overpaid $10,207 in Title II benefits by the Social Security Administration during the period March 1988 to March 1990, and the Court of Appeals decision, filed August 15, 2000 (the "Court of Appeals decision") has found that the Commissioner has produced no documentation in this case showing that payments were actually made to Petitioner. Court of Appeals decision, at Page A-14 hereof; 221 F.3d 1119, 1125 (9th Cir. 2000).

The Court of Appeals decision expressly states that "the record is devoid of any documentation showing that payments were made to [Petitioner] McCarthy . . ." Id.

The Commissioner has issued Regulations at 20 C.F.R. § 404.501(a) that define an "overpayment" under Title II as including a payment in excess of the amount due under Title II of the Social Security Act. See 20 C.F.R. § 404.501(a) *ante.*

The Court of Appeals decision joined the Third and Eighth Circuits in concluding that the Commissioner has the burden of proving both the fact and amount of overpayments. Court of Appeals decision, at Page A-12 and A-13 hereof; 221 F.3d, at 1124.

As a consequence of the finding by the Court of Appeals decision that "the record is devoid of any documentation showing that payments were made to [Petitioner] McCarthy," and as a consequence of the determination by the Court of Appeals decision that the Ninth Circuit joins the Third and Eighth Circuits in concluding that the Commissioner has the burden of proof in proving the fact and amount of overpayment, the Commissioner has failed to

provide the record any document to prove payments were made to Petitioner in the case below to establish subject matter jurisdiction over Petitioner under the overpayment provisions of 42 U.S.C. § 404(a) and the Social Security Act.

B. The Commissioner had a duty to produce all original administrative records for review by Petitioner and his Counsel for them to discover whether the Social Security Administration made any benefit payments to Petitioner with their legal source in Title II during the period March 1988 to March 1990.

"[T]he record is devoid of any documentation showing that payments were made to [Petitioner] McCarthy," and the Commissioner had a duty to produce all original administrative records for review by Petitioner and his Counsel for them to discover whether the Social Security Administration made any benefit payments to Petitioner with their legal source in Title II during the period March 1988 to March 1990.

This duty of the Commissioner was directed by order of an administrative law judge on February 19, 1994 and is required by Fifth Amendment Due Process guarantees.

Administrative Law Judge Order, dated February 19, 1994 (Tr. 371-372); Califano v. Yamasaki, 442 U.S. 683, 688, 696-697 (1979). See also 20 C.F.R. § 506(d).

C. The Commissioner produced no documents showing that payments were made to Petitioner during the period March 1988 to March 1990 for review by Petitioner and his Counsel, and Petitioner and his Counsel were required to rely at a hearing before an administrative judge only on the initial determination of the Commissioner for information on alleged payments to Petitioner - the April 1, 1990 letter of initial determination of the Commissioner that the Court of Appeals decision concludes does not even meet the relaxed standard of substantial evidence.

The Commissioner failed in his duty to provide Petitioner and his Counsel with any documents that showed that payments were made to Petitioner.

A hearing before an administrative law judge may only produce *Evidence*, as defined in 20 C.F.R. 404.702.

Evidence means "any record, document, or signed statement that helps you show whether your are eligible for benefits or whether your are still entitled to benefits." See 20 C.F.R. 404.702 *ante*.

Hearings before an administrative law judge under the Social Security Act are authorized to produce "evidence" only of continuing eligibility or future eligibility for benefits, and, accordingly, rules of evidence applicable to a court of law do not apply. See 20 C.F.R. 404.950(c) *ante.*

In the void of documents produced by the Commissioner to show any payments were made to Petitioner and the availability only of the initial determination of the Commissioner, dated April 1, 1990, before Petitioner and his Counsel, the following exchange took place with the administrative law judge:

"ALJ: And do you know -- do either of you know when the Title II benefits stopped?

ATTY: I believe (emphasis added) the last payment was in February or March of 1990 was the last payment.

ALJ: All right. Now, another question, Counsel, that you probably would have more knowledge about and that is the files that the District Office had on Title II and the Title XVI benefits at one time were not available. Have you seen those files and been able to get information from them (emphasis added)?

ATTY: The only Title II file that I've seen is the file that's here today (emphasis added). I have not seen any other Title II files (emphasis added). I reviewed for the first time on I believe March 17 in the Range Avenue in Santa Rosa the SSI file, which is probably about six to eight inches thick. It's a

sizable file. I have gone back two times since that to get through the entire material, and some of the material including the, as an example, the notification on the SSI overpayments and the decision of the Bureau in 1982 that we referred to in Dr. Lerner's testimony, those were all in the SSI file, and even though that was dealing with Title II, in the last paragraph with Title XVI so that's -- that was the condition of the files. If there's another Title II file some place, I have not seen it. (emphasis added)." Tr. 161.

The Commissioner attempted to introduce in the Appendix to the Commissioner's Appellee Brief before the Court of Appeals Petitioner's Primary Insurance Amount (PIA) history as a document of payments to Petitioner, but this document was struck by the Court of Appeals decision. Court of Appeals decision, at Page A-18 n. 9 hereof; 221 F.3d, at 1126 n. 9.

A PIA history is not a history of payments, but only demonstrates how a person's benefits would have been calculated, not that payments were made. See Chitwood v. Chater, 928 F.Supp. 874, 881 (E.D. Mo. 1996). Every person who has an account with the Social Security Adminsitration has a PIA history as the basis upon which future benefits are based, whether or not that individual is the recipient of benefits. See 42 U.S.C. § 402; 42 U.S.C. § 415(a); 20 C.F.R. § 404.201 and § 404.202. Vol. 1,

McCormick, Harvey L., Social Security Claims and Procedures (Fourth Edition), § 104, at 77-78; Id. (1997 Pocket Part), § 16, at 37.

D. The Commissioner's Answer, filed in the district court, admits that Petitioner at the present time is not and at the time of the administrative decision in question was not, a "Claimant" filing an application for benefits, as defined under present Commissioner's Regulation, 20 C.F.R. § 404.602.

This Court has established that the Social Security Act authorizes the Social Security Administration to give meaning to the term "final decision" through regulations for a "Claimant" to qualify for review under 42 U.S.C. § 405(g). Sims v. Apfel, 530 U.S. ____, 120 S.Ct. 2080, 2083, 147 L.Ed 2d 80, 85 (2000).

The Commissioner admitted in his Answer, filed in the district court below, that Petitioner in this case is neither a "Claimant" at the present time nor was he at the time of the administrative decision under review by the district court a "Claimant" filing an application for benefits from the Social Security Administration. Tr. 87. See also First Amended

Complaint, ¶ 7, at Page 4 (Tr. 468), and Commissioner's admission thereof, at Commissioner's Answer, ¶ 3, at Page 2 (Tr. 550). See 20 C.F.R. § 404.602 *ante*.

Reasons to Grant Writ of Certiorari

I. The Court of Appeals decision of the Ninth Circuit adopts the Third Circuit and Eighth Circuit standards that the Commissioner has the burden of proof of proving the fact and amount of overpayment, but does not apply that standard to the issue of subject matter jurisdiction, despite the finding of the Court of Appeals decision that the Commissioner produced for the record in this case no documents showing that payments were actually made to Petitioner- "the record in this case is devoid of any documents showing that payments were made to [Petitioner] McCarthy."

The Court of Appeals decision purports to join the Third Circuit and the Eight Circuit by adopting their standard that the Commissioner has the burden of proving the fact and amount of overpayment. Court of Appeals decision, at Page A-12 and A-13 hereof; 221 F.3d, at 1124. See Cannuni ex rel. Cannuni v. Schweiker, 740 F.2d 260, 263 (3rd Cir. 1984); United States v. Smith, 482 F.2d 1120, 1124 (8th Cir. 1973).

The Court of Appeals decision, however, does not apply that standard to the issue of subject matter jurisdiction under 42 U.S.C. § 404(a) and the Social Securty Act, when the Court of Appeals decision finds that "the record in this case is devoid of any documentation showing that payments were actually made to McCarthy." Court of Appeals decision, at Page A-14 hereof; 221 F.3d, at 1125.

The Court of Appeals decision does not apply the standard it purports to adopt - placing the burden of proving the fact and amount of overpayment on the Commissioner. The Ninth Circuit Court of Appeals decision is in conflict with the Third Circuit and the Eighth Circuit standards. Id.

II. The Court of Appeals decision of the Ninth Circuit conflicts with the decision of this Court in Califano v. Yamasaki, where this Court (1) requires that the fact of overpayment be accurate and (2) cites Ninth Circuit and Third Circuit case law that the fact of overpayment involves straightforward matters of computation, using documentary proof, such as cancelled checks.

This Court has stated that 42 U.S.C. § 404(a) requires that the fact of overpayment be accurate. Califano v. Yamasaki, 442 U.S., at 693.

This Court in that same case has also stated that the fact of overpayment is subject to written review and, accordingly, cited cases from the Ninth Circuit and the Third Circuit that call for questions of whether an overpayment actually occurred to be resolved by documentary proof, including cancelled checks, when receipt of payment is in dispute. Id, citing Elliot v. Weinberger, 564 F.2d 1219, 1231 (9th Cir. 1977) and Mattern v. Mathews, 582 F.2d 248, 255-256 (3rd Cir. 1978). See also Mattern v. Weinberger, 519 F.2d 150, 165 (3rd Cir. 1975).

III. The Court of Appeals decision of the Ninth Circuit conflicts with the clear requirement of this Court and clear precedent in the Second, Eighth and Tenth Circuits that a "final decision" for the purpose of judicial review under 42 U.S.C. § 405(g) includes the non-waivable jurisdictional requirement that the decision of the Commissioner being reviewed thereunder results in the denial of a "Claimant's" application for benefits.

This Court has been consistently clear in successive precedent that the requirement of a "final decision" for the purpose of judicial review under 42 U.S.C. § 405(g) includes the non-waivable and non-excusable jurisdictional requirement that the decision of the Commissioner being reviewed thereunder result in the denial of a "Claimant's" application for benefits. Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. ___, 120 S.Ct. 1084, 1094, 146 L.Ed 2d 1, 14-15, 17-18 (2000); Bowen v. City of New York, 476 U.S. 467, 483 (1986); Mathews v. Eldridge, 424 U.S. 319, 328 (1976).

The Second, Eighth and Tenth Circuits have honored the precedents of this Court. See Abbey v. Sullivan, 978 F.2d 37, 43 (2nd Cir. 1992); Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 969 (8th Cir. 1983); Reed v. Heckler, 756 F.2d 779, 782-783, 785 n. 8 (10th Cir. 1985).

Nevertheless, the Court of Appeals decision for the Ninth Circuit overlooks the consistent precedent of this Court and that of the Second, Eighth and Tenth Circuits by concluding:

"Nothing in the Social Security Act indicates that an individual must be requesting or receiving benefits at the time of the ALJ's decision in order to seek review under § 405(g)."

See Court of Appeals decision, at Page A-10 hereof; 221 F.3d, at 1124.

The Commissioner admitted in his Answer, filed in the district court below, that Petitioner in this case is neither a "Claimant" at the present time nor was he at the time of the administrative decision under review by the Court of Appeals decision, a "Claimant" filing an application for benefits from the Social Security Administration. Tr. 87. See also First Amended Complaint, ¶ 7, at Page 4 (Tr. 468), and Commissioner's admission thereof, at Commissioner's Answer, ¶ 3, at Page 2 (Tr. 550).

IV. The district court below, as a court of limited jurisdiction, is presumed to lack jurisdiction in the case below until it has been affirmatively demonstrated that subject matter jurisdiction exists, and the Court of Appeals decision for the Ninth Circuit may not use the "substantial evidence" standard established by 42 U.S.C. § 405(g) to determine whether the district court has jurisdiction under § 405(g), prior to the determination that the district court has, in fact, subject matter jurisdiction under § 405(g).

United States District Courts are courts of limited jurisdiction where it is presumed that the federal court lacks jurisdiction in a particular case, until it has been affirmatively demonstrated that subject matter jurisdiction exists. Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

It is a fundamental principle that federal courts are courts of limited jurisdiction and that these limits, whether imposed by the Constituition or by Congress, must neither be disregarded or evaded. Id.

The Court of Appeals decision seeks to evade the issue of whether 42 U.S.C. § 405(g) confers subject matter on the district court in the case below by using the "substantial evidence" standard authorized by § 405(g) to prove subject matter jurisdiction under § 405(g) itself. Court of Appeals decision, at Page A-6 to A-12 hereof; 221 F.3d, at 1122-1124.

Moreover, in so doing the Court of Appeals decision seeks to dilute even the "substantial evidence" standard itself by bringing a "tacit admissions" and implicit acknowledgment" evidentiary analysis in proximity to the

"substantial evidence" standard - without citation to any authority for such an evidentiary analysis. Court of Appeals decision, at Page A-14 and A-15 hereof; 221 F.3d, at 1125.

This Court has recently held that where the application of § 405(h) would otherwise preclude judicial review, 28 U.S.C. § 1331 permits district court subject matter jurisdiction for judicial review. Shalala v. Illinois Council on Long Term Care, Inc., 120 S.Ct., at 1096-1097, 1099-1100, 146 L.Ed.2d, at 17-18, 20-21 (2000).

Conclusion

Based on the foregoing, Petitioner respectfully requests that Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit be granted.

Dated: January 24, 2001

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Attorney For Petitioner

APPENDIX

Charles M. McCARTHY, Jr.,

Plaintiff-Appellant

v.

Kenneth S. APFEL, Commissioner of the Social Security Administration,

Defendant-Appellee.

No. 98-15238

United States Court of Appeals,

Ninth Circuit

Argued March 9, 1999

Submission Deferred March 9, 1999

Submitted June 9, 2000

Filed August 15, 2000

Before: O'SCANNLAIN and WARDLAW, Circuit Judges, and BYRNE, District Judge.

BYRNE, Senior District Judge:

Appellant Charles M. McCarthy, Jr.("McCarthy") appeals from the district court's decision on summary judgment (1) upholding the Commissioner of Social Security's determination that McCarthy was overpaid $ 10,207.00 in disability insurance benefits pursuant to Title II of the Social

Security Act. 42 U.S.C. § 401 *et seq.* and (2) remanding the case to the Commissioner pursuant to 42 U.S.C. § 405(g) for a determination of whether McCarthy was "without fault" in connection with the overpayments. The district court had jurisdiction pursuant to 42 U.S.C. § 405(g), and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

STATEMENT OF FACTS

McCarthy stopped working in 1980 due to a psychological disability and began receiving Title II disability insurance benefits[1], as well as Title XVI supplemental security income, based on application filed on January 8, 1981. McCarthy returned to work in December 1987, and his Title XVI supplemental security income ended two months later.

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1 Under Title II of the Social Security Act, the federal government provides disability benefits to individuals who have contributed to the Social Security program and who, because of a medically determinable physical or mental impairment, are unable to engage in substantial gainful work. 42 U.S.C. §§ 423(a), (d). Title II is administered in conjunction with state welfare agencies and provides benefits only while an individual's statutory disability persists. 42 U.S.C. §§ 421(a), 423(a)(1).

McCarthy, however, allegedly continued to receive and cash Title II disability benefits through March 1990.

By letters dated January 25 and February 12, 1990, the Social Security Administration ("SSA") notified McCarthy that he was able to perform substantial gainful activity as of December 1987, and that his eligibility for Title II disability benefits had ended in February, 1988. By letter dated April 1, 1990, the SSA notified McCarthy that he had been overpaid $ 10,207.00 in Title II disability benefits for the period from March 1988 through March 1990. McCarthy's appeal of this initial determination and request for waiver of the recovery of the overpayment was partially denied on reconsideration after a personal conference with the SSA.[2] On June 30, 1995, following an administrative hearing, McCarthy's request for waiver was denied by an Administrative Law Judge ("ALJ").

The AlJ's decision became the final decision of the Commissioner when the Appeals Council declined to review it on November 22, 1996. McCarthy then sought review pursuant to 28 U.S.C. § 1331 and as "alleged under" 42

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2 McCarthy subsequently repaid $350, and another $539.20 was recovered, leaving a balance of $9,367.80.

U.S.C. § 405(g). On cross-motions for summary judgment, the district court found that McCarthy had been overpaid $ 10,207.00 in Title II disability benefits during the period from March 1988 to March 1990. However, the district court reversed the Commissioner's determination that McCarthy was at fault for the overpayments and remanded to the Commissioner for a full and fair hearing on the question of fault. McCarthy timely appealed.[3]

STANDARD OF REVIEW

"The basis for the district court's jurisdiction and the grant of summary judgment are reviewed de novo." *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 755 (9th Cir. 1992), *amended by* 985 F.2d 1419 (9th Cir. 1993). The Commissioner's factual findings are reviewed for substantial evidence. *See* 42 U.S.C. § 405(g).

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[3] In *Forney v. Chater*, 108 F.3d 228 (9th Cir. 1997), we held that a remand pursuant to the Social Security Act is not appealable. After the Supreme Court granted certiorari in that case, the Commissioner obtained a stay of proceedings of the present case pending a decision by the Supreme Court in *Forney*. The Supreme Court subsequently reversed our ruling in *Forney*. *see* 524 U.S. 266, 118 S.Ct. 1984, 141 L.Ed.2d 269 (1998), thus rendering the district court's remand order in the present case final and appealable.

DISCUSSION

The Social Security Act includes the following statutory scheme for adjustment or recovery of benefits as a result of an overpayment:

With respect to payment to a person of more than the correct amount, the Commissioner of Social Security shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall obtain recovery by means of reduction in tax refunds . . ., or shall apply any combination of the foregoing.

42 U.S.C. § 404(A)(1)(A). However, "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or

recovery would defeat the purpose of this subchapter or would be against equity and good conscience." *Id.* § 404(b).

I

Jurisdiction

McCarthy first claims that the district court erred in basing jurisdiction over his action on 42 U.S.C. § 405(g). Importantly, McCarthy does not dispute that the district court had jurisdiction, nor does he dispute that this court's jurisdiction on appeal. McCarthy instead seeks a ruling that the district court could not exercise jurisdiction under § 405(g) until the Commissioner showed that McCarthy had, in fact, received overpayments of Title II disability benefits between March 1988 and March 1990, the period for which the Commissioner seeks recoupment. Absent such a showing, McCarthy contends, review can only have been proper under general federal question jurisdiction, 28 U.S.C. § 1331.

The importance of this jurisdictional determination is two-fold. First, if, as McCarthy contends, jurisdiction is not proper until the Commissioner proves the fact of overpayment, then the Commissioner bears the burden of proving overpayment by a preponderance of the evidence, rather than by "substantial evidence" as set out in § 405(g). Second, if the district court's jurisdiction did not arise under § 4059(g), then the court may have been without authority to remand the case to the Commissioner.[4]

Section 405(g) provides a jurisdictional basis for review of a final decision of the Commissioner denying a waiver of recovery of an overpayment of Title II disability benefits. Section 405(g) states:

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days . . . . Such action shall be brought in the district

[4] Section 405(g) provides in pertinent part that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the case for rehearing." 42 U.S.C. § 405(g).

court of the United States for the judicial district in which the plaintiff resides . . . .

42 U.S.C. § 405(g).

In *Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979), the Supreme Court described the general steps a Title II recipient must take to obtain review of an alleged overpayment:

> The [Commissioner's] practice is to make an *ex parte* determination under [42 U.S.C. § 404(a)] that an overpayment has been made, to notify the recipient of that determination, and then to shift to the recipient the burden of either (i) seeking reconsideration to contest the accuracy of the determination, or (ii) asking the [Commissioner] to forgive the debt and waive recovery in accordance with [§ 404(b)]. If a recipient files a written request for reconsideration or waiver, recoupment is deferred pending action on that request. The papers are sent to one of seven regional offices where the request is reviewed.
>
> If the regional office decision goes against the recipient . . . [the recipient is] given an opportunity to present his story in person to someone with authority to decide his case. That

opportunity takes the form of an on-the-record *de novo* evidential hearing before an independent hearing examiner. The recipient may seek subsequent review by the Appeals Council and finally by a federal court [under § 405(g)].

Id., at 686-87, 99 S.Ct. 2545 (footnote and citations omitted). McCarthy went through each of the early steps described in *Yamasaki* for seeking reconsideration of the initial overpayment determination. He filed a request for waiver, presented his story to an ALJ, and sought subsequent review by the Appeals Council. McCarthy disputes, however, the final step - judicial review under § 405(g) - was available in his case.

[1] Reduced to its essence, McCarthy's argument is that judicial review is only available under § 405(g) if the Commissioner first proves that the plaintiff in the district court action was, at the time of the ALJ's decision, (1) a Social Security claimant (2) who received overpayments of Title II disability benefits during the period in question. McCarthy claims that, because the Commissioner presented no evidence that he was a Social Security claimant at the time of the ALJ's

decision or that he received overpayments from March 1988 to March 1990, his actio to enjoin the Commissioner from recouping the alleged overpayments cannot be construed as an action for review of a final decision of the Commissioner pursuant to § 405(g).

[2] McCarthy's first argument, that jurisdiction cannot have risen under § 405(g), as he was not a Social Security "claimant" at the time of the ALJ's decision, borders on frivolous.[5] Nothing in the Social Security Act indicates that an individual must be requesting or receiving benefits at the time of the ALJ's decision in order to seek review under § 405(g). Indeed, § 405(g) provides that "any individual" who is a party to a Social Security hearing may obtain judicial review of the Commissioner's ruling.

In any event, McCarthy does not deny he was a Social Security claimant in 1981 when he filed for Title II disability benefits, and McCarthy remains a "claimant" with respect to the Commissioner's efforts to recover alleged overpayments on that claim. That McCarthy was not asserting

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5 "Claimant" is defined as "the person who files an application for benefits for himself or herself or the person for whom the application is filed." 20 C.F.R. § 404.602.

a continuing right to disability benefits in 1995 did not destroy his status as a claimant with respect to the Title II disability benefits for which he applied in 1981 and from which the Commissioner seeks recoupment of overpayments.

[3] McCarthy's second argument, that jurisdiction cannot have arisen under § 405(g) unless the Commissioner first proved by a preponderance of the evidence that McCarthy received overpayments during the relevant period, also fails. To recover overpayments, the Commissioner must show that the claimant actually received benefits beyond the correct amount. *See* 42 U.S.C. § 404(a). However, the Commissioner's alleged failure to make these showings does not render judicial review under § 404(g) improper. Rather, the district court, on judicial review, must determine whether the Commissioner established the fact and amount of overpayment by substantial evidence. In other words, proof of an overpayment is a requirement for recovery, not a prerequisite to judicial review. [6]

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[6] Indeed, it would make little sense for the Commissioner to prove the fact of overpayments by a preponderance of the evidence and then, having triggered § 405(g), review the very same factual determination under the less stringent substantial evidence standard of proof.

We therefore hold that the district court properly exercised jurisdiction over McCarthy's action pursuant to 42 U.S.C. § 405(g).

II

Substantial Evidence

In the usual overpayment case, a claimant does not contest the fact or amount of the overpayments. Rather, the claimant typically contests only the Commissioner's determination that he was not "without fault" for receiving the overpayments and, consequently, that he is not entitled to a waiver of recovery. Here, however, McCarthy contests both the fact and amount of the alleged overpayments and claims that the district court erred in affirming the Commissioner's finding that he received $ 10,207.00 in overpayments during the period from March 1988 to March 1990.

[4] Although the Social Security Act does not designate which party bears the burden of establishing the fact and amount of overpayments, each circuit to consider the issue has held that the Commissioner has that burden. *See Cannuni ex rel. Cannuni v. Schweiker*, 740 F.2d 260, 263 (3d Cir.

1984); *United States v. Smith*, 482 F.2d 1120, 1124 (8th Cir. 1973). We join these circuits and hold that the Commissioner bears the burden of proving the fact and amount of overpayment. The Commissioner must establish: (1) that McCarthy received Title II disability benefits from March 1988 to March 1990; (2) that these benefits were in excess of the amount to which McCarthy was entitled; and (3) that the overpayment was in the amount of $ 10,207.00.

Because jurisdiction arose under 42 U.S.C. § 405(g), the district court properly reviewed for "substantial evidence" the Commissioner's determination that McCarthy had been overpaid benefits in the amount of $ 10,207.00. *See* 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . ."). Substantial evidence is such relevant evidence as a reasonable mind might, upon consideration of the entire record, accept as adequate to support a conclusio. *See Richarson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *see also Young v. Sullivan*, 911 F.2d 180, 183 (9th Cir. 1990) ("Substantial

evidence means 'more than a mere scintilla,' but 'less than a preponderance.'" (citation omitted)).

A. Payment of Title II benefits

[5] Payments of Title II benefits are generally proved by the Commissioner through computerized SSA payment records and cancelled checks from the Treasury Department. Though the record in this case is devoid of any documentation showing that payments were actually made to McCarthy, the district court considered other evidence in finding that the Commissioner proved the payment of benefits after February 1988. The court first noted that McCarthy admitted in April 1995 hearing before the ALJ that he received Title II disability payments after February 1988. The admission is clear in an exchange between the ALJ and McCarthy's attorney (the same attorney who represents McCarthy on appeal):

"ALJ: And do you know -- do either of you know when the Title II benefits stopped?

ATTY: I believe the last payment was in February of March of 1990 was the last payment.[7]

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[7] At several points in his briefing, McCarthy contends that the ALJ never found that he had received benefits through March 1990. This contention is plainly refuted by the ALJ's finding that "claimant was overpaid

McCarthy's admission alone constitutes substantial evidence of payment.

[6] Additionally, the district court found that McCarthy had also tacitly admitted that he was paid benefits after March 1988 by making partial reimbursement of the overpaid amounts and by filling out a request for a waiver of recovery.[8]

The district court did not err in finding that the payment of Title II disability benefits to McCarthy during the period from March 1998 to March 1990 was supported by substantial evidence.

B. Fact of overpayment

benefits . . . under Title II of the Social Security Act from March 1988 to March 1990."

8 McCarthy contends that the district court erred in relying on the above evidence because the hearing before the ALJ was a non-adversarial proceeding and because the ALJ improperly admitted evidence, including McCarthy's partial reimbursement of the overpayment amount due, that would not have been admissible under the Federal Rules of Evidence. The ALJ, however, was not bound by the rule of evidence applicable to court proceedings. 42 U.S.C. § 405(b) provides that "[e]vidence may be received at *any hearing* before the Secretary even though inadmissible under the rules of evidence applicable to court procedure. Courts have regularly found § 405(b) applicable in actions to recover overpayments of benefits." *See, e.g., Howard v. Secretary of the Dep't of Health and Human Servs.*, 741 F.2d 4, 9 (2d Cir. 1984).

McCarthy concedes that by March 1988 he was able to perform substantial gainful activity, and that his benefits should have ceased at that time. Thus, proof of payment after 1988 and proof of overpayments are one and the same.

C. Amount of overpayment

In addition to establishing that McCarthy received overpayments, the Commissioner must also prove by substantial evidence the amount of those overpayments.

The only document in the record that identifies specific payments from March 1988 through March 1990 is an April 1, 1990 letter from the SSA to McCarthy that provides in pertinent part:

We have determined that you received $ 10,207.00 more in Social Security benefits than you were due. This overpayment occurred because of your substantial gainful work activity. Benefits for you have terminated effectively March 1988. Please see chart below:

You received:	You should have received:
	$0.00 for 03/88-

$468.00 prior overpayment balance 03/90

$377.00 for 3/88-09/88
$376.80 for 10/88-11/88
$391.90 for 12/88-11/89
$410.90 for 12/89-03/90

Therefore, you are overpaid $ 10,207.00

[7,8] When a claimant challenges the SSA's initial determination of the amount that he was overpaid, the Commissioner must present reliable evidence of the particular overpayments. The Commissioner's unsubstantiated belief that particular payments were made is not enough. The letter, standing alone, does not constitute substantial evidence of the amount of overpayments. The district court erred in relying exclusively on this letter in rejecting McCarthy's challenge to the amount of overpayments.

Although cancelled checks may be the best evidence of the amount of overpayment, *see Chitwood v. Chater*, 928 F.Supp. 874, 882 (E.D. Mo. 1996), they are not the only evidence sufficient to satisfy the Commissioner's burden. The Commissioner could, for instance, subpoena a claimant's bank records to show the deposit of checks matching the claimed payments. Or the Commissioner might rely upon the

claimant's own prior admissions that he received payments in the claimed amounts.

[9] We do not endeavor to offer an exhaustive list of the types of evidence by which the Commissioner could satisfy his burden. We simply hold that production of an initial determination letter is not enough and that, on remand, the Commissioner continues to have the burden of establishing by substantial evidence the amount of overpayments of Title II benefits to McCarthy.[9]

III

"Without Fault"

McCarthy's final contentions relate to the district court's decision to remand the case to the Commissioner for consideration of whether he was "without fault" with respect to the overpayments and, if so, whether reimbursement should

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[9] We grant McCarthy's motion to strike from the Commissioner's brief an addendum containing purported evidence of the amount of overpayments received by McCarthy between March 1988 to March 1990. These computerized records of planned or actual payments were not before either the ALJ or the district court and will not be considered by this court. *See* Fed.R.App.P 10(a); 9th Cir. Rule 10-2.

be excused because it would defeat the purpose of Title II or would be against equity or good conscience. *See* 42 U.S.C. § 404(b).

[10] The regulations provide that an overpaid individual may be found at fault if the overpayments resulted from: (1) an incorrect statement made by the individual that he knew or should have known to be incorrect; (2) failure to furnish information that he knew or should have known to be material; or (3) acceptance of a payment that he either knew or could have been expected to know was incorrect. *See* 20 C.F.R. § 404.507. The overpaid individual bears the burden of proving that he was without fault. *See Anderson v. Sullivan*, 914 F.2d 1121, 1122 (9th Cir. 1990).

[11] McCarthy does not challenge the district court's finding that the Commissioner's determination of fault was not supported by substantial evidence. Rather, McCarthy asserts that remand for a further hearing on fault was improper. He first claims that both the ALJ and the district court were bound by the SSA's May 25, 1993 determination, following a personal conference, that McCarthy was without fault for overpayments made from February 1988 through

December 1989. McCarthy argues that the ALJ could not revisit this issue without giving written notice in advance of the hearing, as required by 20 C.F.R. § 404.946(a).

McCarthy's argument hinges on a misreading of § 404.946(a), which provides:

The issues before the [ALJ] include all the issues brought out in the initial, reconsidered or revised determination that was not decided entirely in your favor. However, If evidence presented before or during the hearing causes the [ALJ] to question a fully favorable determination, he or she will notify you and will consider it an issue at the hearing.

20 C.F.R. § 404.946(a). Nothing in this section requires the ALJ to notify an individual prior to the hearing, or in writing, that an issue previously decided in his favor will be considered as an issue at the hearing. Indeed, § 404.946(a) expressly contemplates notification "at the hearing." 20 C.F.R. § 404.946(a); *see also Highfill v. Bowen*, 832 F.2d 112, 115 (8th Cir. 1987) ("[Section] 404.946(a) provides that ALJ may reexamine a favorable determination if evidence presented during the hearing calls the determination into question.").

[12] McCarthy's second argument also fails. According to McCarthy, the record demonstrates that his average monthly expenses exceed his average monthly income, and, consequently, that reimbursement would defeat the purpose of Title II or would be against equity or good conscience. However, the district court remanded the case to the ALJ for a hearing on the fault issue. There is no reason for the district court to address whether, in the event McCarthy is found to be without fault, repayment would defeat the purpose of Title II or would be against equity or good conscience.[10]

CONCLUSION

For the foregoing reasons, we AFFIRM IN PART and REVERSE IN PART the district court's decision on summary judgment. The district court's exercise of jurisdiction is AFFIRMED, as is the finding that there was an overpayment. The case is REMANDED to the district court. Consistent with this opinion, the district court is to remand the

10 The Commissioner has not appealed the district court's decision to vacate the ALJ's fault determination and to remand for a full and fair hearing to determine whether McCarthy was without fault.

case to the Commissioner to determine the amount of Title II disability benefits that McCarthy was overpaid. If the Commissioner determines that some amount of overpayment was shown be substantial evidence, the Commissioner shall proceed with a hearing concerning whether McCarthy was without fault with respect to that overpayment and, if he was without fault, whether reimbursement of the overpaid benefits should be excused because reimbursement would defeat the purpose of Title II or would be against equity or good conscience. Each side will bear it own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Ninth Circuit Docket Sheet Entry

For Proceedings in Docket No. 98-15238

10/26/00	Filed order (Diarmuid F. O'SCANNLAIN, Kim M. WARDLAW, William M. Byrne,): . . . The petition for rehearing is DENIED

and the suggestion for rehearing en banc is REJECTED. [98-15238] (hh)